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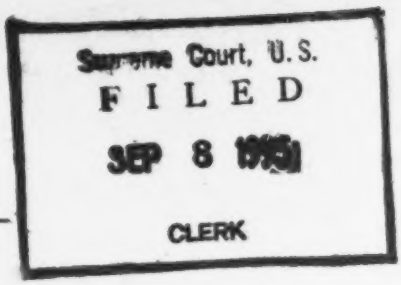

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

RICHARD HOPEWELL,

Petitioner,

v.

WILLIAM DUNKER, JANET BREKKE, JOHN DOE, JANE DOE, JOHN ROE, JANE ROE, MIKE MOE, individually and in their capacities as employees of the City of Sioux Falls, CITY OF SIOUX FALLS, MIDCONTINENT BROADCASTING CORPORATION dba KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG AND VARIOUS OTHER UNIDENTIFIED PERSONS, individually and in their capacities as employees and agents of Midcontinent Broadcasting Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CORRECTED PETITTON FOR WRIT OF CERTIORARI

Richard Hopewell
Petitioner pro se.
423 South Phillips Avenue
Sioux Falls, South Dakota 57102
[605]334-0982

QUESTIONS PRESENTED

1. DID TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR LEAVE TO FILE HIS THIRD AMENDED COMPLAINT DEPRIVE PLAINTIFF OF DUE PROCESS [FRCvP 15(a)] OF LAW GUARANTEED PETITIONER BY FOURTEENTH AMENDMENT?

2. DID TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR CONTINUANCE OF APRIL 18, 1994 HEARING ON RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT DEPRIVE PETITIONER OF HIS RIGHT TO DUE PROCESS [FRCvP 56(f)] OF LAW GUARANTEED PETITIONER BY THE FOURTEENTH AMENDMENT?

3. WITH NO STATUTORY AUTHORITY, DID CITY HAVE RIGHT UNDER COLOR OF ITS POLICE POWER TO KEEP AND DISSEMINATE REPORT ON PETITIONER'S CONDUCT FOR WHICH HE HAD NOT BEEN CHARGED WITH A CRIMINAL OFFENSE AND WHEREIN HE HAD BEEN DETAINED FOR A REASON OTHER THAN AN ARREST FOR A CRIMINAL OFFENSE?

4. DID GOVERNMENT'S INTENTIONAL RELEASE OF CONFIDENTIAL RECORD ABOUT PETITIONER TO PUBLIC WHERE PROHIBITED BY STATE STATUTES INVADE PETITIONER'S RIGHT TO PRIVACY GUARANTEED BY FOURTH AMENDMENT IN VIOLATION OF EQUAL PROTECTION CLAUSE OF FOURTEENTH AMENDMENT?

5. WHERE GENUINE ISSUE OF MATERIAL FACT HEREIN REMAINS TO BE RESOLVED BY JURY, DID TRIAL COURT ERR IN ENTERING SUMMARY JUDGMENT FOR RESPONDENTS?

6. DID DUNKER AFFIDAVIT WORK FRAUD ON STATE TRIAL COURT?

7. DOES NEWLY DISCOVERED EVIDENCE THAT RESPONDENT BREKKE'S SUBMISSION OF FALSE POLICE RECORDS ABOUT PETITIONER TO STATE TRIAL COURT WORK FRAUD ON STATE COURT AND, FOR WANT OF DISCLOSURE HEREIN BY RESPONDENTS BREKKE AND CITY OF SIOUX FALLS, ON U.S. DISTRICT COURT AND THE U.S. COURT OF APPEALS HEREIN?

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REPORTED LOWER COURT OPINIONS

Neither the Order of Dismissal (Appendix B) and Summary Judgment for Respondents made and entered by the Southern Division of the U.S. District Court of South Dakota nor the Opinion (Appendix A) and Judgment in affirmance thereof by the U.S. Circuit Court of Appeals for the Eighth Circuit are published in an official reporter.

JURISDICTION

The Judgment and Opinion (Appendix A) herein by Petitioner sought to be reviewed by this Court was made and entered by the U.S. Court of Appeals for the Eighth Circuit on June 5, 1995. Jurisdiction of this Court is by the Petitioner invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment in material part provides:

> "The right of the people to be secure in their persons, . . . papers and effects, against unreasonable searches and seizures, shall not be violated."

Section 1 of the Fourteenth Amendment in

in material part provides:

". . . [N]or shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Relative to the Federal Freedom of Information Act, 5 U.S.C. §552(b)(7)(C) provides:

". . . This section does not apply to matters that are . . . investigatory records compiled for law enforcement purposes, but . . . constitute an unwarranted invasion of personal privacy . . . ."

42 U.S.C. §1983 in material part provides:

"Every person who, under color of any statute, ordinance, . . . custom and usage, of any State . . ., subjects . . . any citizen . . . within the jurisdiction thereof to the deprivation of any rights secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

SDCL 23-5-1 in material part provides:

"The attorney general shall procure and file for record . . . information as may be pertinent of all persons who may hereafter be taken into custody for offenses other than those arising solely out of the violation of the fish, game, conservation, or traffic laws of this state with the exception of those persons charged with driving a motor vehicle while under the influence of alcoholic beverages, and also of all criminals wheresoever the same may be procured . . . ."

SDCL 1-27-1 provides:

"In every case where the keeping of a record, or the preservation of a document or other instrument is required of an officer or public servant under any statute of this state, such record, document, or other instrument shall be kept available and open to inspection by any person during the business hours of the office or place where the same is kept."

SDCL 1-27-3 provides:

"Section 1-27-1 shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept."

SDCL 23-5-10(1) provides:

"'Confidential criminal justice information,' criminal identification information compiled pursuant to chapter 23-5, criminal intelligence information, criminal investigative information, criminal statistics information made confidential pursuant to § 23-6-14, and criminal justice information otherwise made confidential by law."

SDCL 23-5-11 provides:

"Section 1-27-1 does not apply to confidential criminal justice information."

FRCvP 15(a) in material part provides:

". . . Otherwise a party may amend the party's pleading only by leave of the court . . .; and leave shall be freely given when justice so requires."

FRCvP 56(c) in material part provides:

". . . The judgment sought shall be ren-

dered forthwith if the pleadings, depositions, anwers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . ."

FRCvP 56(f) provides:

"Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

STATEMENT OF CASE

On May 28, 1978, Petitioner was detained by the City of Sioux Falls Police Department (SFPD) for an of record reason other than an arrest for a criminal offense. While the SFPD has no lawful authority to collect and retain in its record any data on Petitioner other than criminal offenses for which Petitioner had been arrested, the SFPD kept a microfice record of a SFPD May 28, 1978 noncriminal "incident", vis-à-vis criminal "offense", report which contained false and highly defam-

atory information about Petitioner.

On October 26, 1990, Respondent John Doe, as an employee of Respondent City of Sioux Falls, read, without the knowledge and consent of Petitioner, false and defamatory contents of said confidential report over the telephone to television news reporter Respondent Armstrong, from which information Respondent Armstrong later that day at 6:00 p.m. in error broadcast to the public that, as a result of the aforesaid incident, Petitioner had been charged and arrested for a heinous felony to the end, in conspiracy with Defendants John Doe and City of Sioux Falls, of so stigmatizing Petitioner's community reputation for bad character and immoral criminal behavior as to immediately foreclose Petitioner's opportunity to be employed as a state circuit court judge by majority vote of the Minnehaha County, South Dakota electorate in the November 6, 1990 general election.

In advance of her foregoing broadcast, Respondent Armstrong in conspiracy also sought and received from Respondents John Doe and

Jane Doe, presumably an employee of Respondent City of Sioux Falls, false and defamatory information that Petitioner had been committed to the state mental hospital, which Respondent Armstrong therein in error broadcast to the public.

Derived from the foregoing false and defamatory information provided Respondent Armstrong by Respondents John Doe, Jane Doe and John Roe, Respondent Hemmingsen on October 26, 1990 at 10:00 p.m. in error broadcast that Petitioner had allegedly been arrested for a heinous felony and turned up naked at a church.

For foregoing false defamations of Petitioner by Respondents Midcontinent Broadcasting Corporation, Hemmingsen and Armstrong, Plaintiff commenced an action against them in libel and slander in state court in November of 1990.

In a spurious attempt to circumvent the confidential status of the aforesaid May 28, 1978 SFPD incident report and therewith ex post facto change the noncriminal disposition

of said incident into an arrest for a criminal offense, Respondent Brekke, in her capacity as legal advisor to the Sioux Falls Police Department, advised police officer Respondent Dunker to collaborate with a paralegal of the law firm representing Respondents Midcontinent Broadcasting, Hemmingsen and Armstrong in production of an affidavit wherein, from his review of the May 28, 1978 incident report, Respondent Dunker imputes that Plaintiff committed a heinous felony; which libelous affidavit was, over meritorious objection by Petitioner, offered by said Respondents into evidence in the state defamation action to spuriously establish that Petitioner had been "arrested" for a heinous felony as broadcast by Respondents Armstrong and Hemmingsen.

On August 26, 1993, Respondent Brekke, without notice to Petitioner, under color of law adduced into the state court record a SFPD computer printout and a Record From Sioux Falls Police Department respectively attached as Exhibits 2 and 3 to Petitioner's

August 3, 1994 Motion herein for Rule 2 Suspension and Remand by the U.S. Court of Appeals for the Eighth Circuit to the South Dakota U.S. District Court to entertain Petitioner's Motion to Vacate Summary Judgment Pursuant to FRCvP 60(b)(2)(3); which Motion for Remand the U.S. Court of Appeals for the Eighth Circuit denied by Order (Appendix D).

In that it is herein undisputed that the SFPD computer printout contained the false entry that Petitioner had been arrested for a heinous felony on May 28, 1978 and the Record from Sioux Falls Police Department contained false entries that Petitioner had been "charged" with a heinous felony on May 28, 1978 and, in disposition of an unrelated misdemeanor offense, taken to the state mental hospital; such false police records worked fraud on the state trial court; the nondisclosure of which actions by Respondent Brekke, being material facts required for Petitioner to litigate his claims herein, worked fraud on the U.S. District Court in its dismissal of Plaintiff's §1983 claims herein and worked further fraud

on the U.S. Court of Appeals in its affirmance of the U.S. District Court's summary judgment in favor of Respondents.

The U.S. District Court's jurisdiction herein bases on 28 U.S.C. §1343 and 42 U.S.C. §1983. The U.S. Court of Appeals appellate jurisdiction bases on 28 U.S.C. §1291.

[Numbers in parentheses are pages in lower court record]

ARGUMENT

1. TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR LEAVE TO FILE HIS THIRD AMENDED COMPLAINT DEPRIVED PETITIONER OF DUE PROCESS OF LAW [FRCvP 15(a)] GUARANTEED BY FOURTEENTH AMENDMENT

FRCvP 15(a) provides that leave for a party to file an amended complaint "shall be freely given when justice so requires." As, with Allegation XIV of his Third Amended Complaint (20) in amendment of Allegation 28 in his Second Amended Complaint (16), Petitioner seeks 42 U.S.C. §1983 redress for Respondents' violations of Petitioner's right to privacy of state law enforcement investigative records not resulting in charge and arrest for a criminal offense in counterpart to right of those

investigated by federal law enforcement agencies to, by operation of 5 U.S.C. §552(b)(7)(C), not have their privacy invaded and herein creative of a similar right to privacy guaranteed by the Fourth Amendment so as to herein exhaust all of Petitioner's constitutional rights on the merits herein beyond the merits of the herein complained of violation of due process and equal protection clauses of the Fourteenth Amendment, justice herein required trial court's grant of Petitioner's Motion for Leave for Leave to File Third Amended Complaint (20). Middle Atlantic Utilities Co. v. S.M.W Development Corp., 392 F.2d 380 (CA NY 1968).

Contrary to the U.S. District Court's finding in its February 24, 1994 order denying Petitioner's Motion for Leave to File Third Amended Complaint that Petitioner failed "to file a copy of the proposed amended pleadings with the motion", and further contrary to the U.S. Court of Appeal's finding and holding in its June 5, 1995 Opinion (Appendix A) that:

"[A]s Hopewell failed to submit his proposed amended complaint with his motion to amend, the district court did not abuse its discretion in denying Hopewell's motion for leave to file his third amended complaint";

the record (20) clearly indicates that the Petitioner motioned the U.S. District:

". . . Court for an order granting Plaintiff leave to file his annexed and herewith filed and served third amended complaint in amendment of his complaint, first amended complaint and second amended complaint."

2. TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR CONTINUANCE OF 4-18-94 HEARING ON RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT DEPRIVED PETITIONER OF DUE PROCESS OF LAW [FRCvP 56(f)] GUARANTEED PETITIONER BY THE FOURTEENTH AMENDMENT

To be noted in Petitioner's Affidavit in opposition to Motions for Summary Judgment (37), evidence essential for Petitioner to herein opposed Respondents' Motions for Summary Judgment (22,25) is in the exclusive possession of the Respondents, has been withheld from Petitioner in state court proceedings and Petitioner must be given the opportunity to obtain facts essential to any further opposition to the Motions for Summary Judgment under FRCvP 56(f).

FRCvP 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

As Petititioner's Affidavit in Opposition to Motions for Summary Judgment (37) without question demonstrates why, due to the prior refusal of Respondents Midcontinent Broadcasting, Hemmingsen and Armstrong in state court proceedings to disclose the identification of Respondents John Doe, Jane Doe and John Roe so as to therewith preclude further discovery from the unidentified Respondents of facts which are material and essential to Petitioner's litigation of both the state court action and the federal court action herein, Petitioner could not at the April 18, 1994 hearing on Defendants' Motions for Summary Judgment (23,25) by affidavit present to the trial court material facts essential in Petitioner's opposition to Respondents' said Motions

for Summary Judgment; the trial court should have refused Respondents' application for summary judgment and therewith ordered a continuance of the April 18, 1994 hearing to thereafter permit Petitioner's theretofore altogether denied reasonable time and opportunity to conduct discovery by interrogatories, requests for admissions, requests for production of documents, depositions and affidavits so that the trial court could thereafter make and enter such other order than to grant Respondents' Motions for Summary Judgment as would thereafter be just on the yet to be and theretofore adjudicated facts and merits of Petitioner's 42 U.S.C. §1983 claims herein against Respondents. Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 389, certiorari denied, 428 U.S. 915 (CA8 1975).

Where Petitioner has never had a "full opportunity to conduct discovery" herein as required by Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986), the trial court abused its discretion in denying Petitioner's Motion for Continuance of Proceedings on Mot-

ions for Summary Judgment (34) supported by Affidavits (35,37,39) of Petitioner and thereafter abused its discretion in granting Respondents' Motions for Summary Judgment.

3. WITH NO STATUTORY AUTHORITY, CITY DOES NOT UNDER COLOR OF ITS POLICE POWER HAVE RIGHT TO KEEP AND DISSEMINATE REPORT ON PETITIONER'S CONDUCT FOR WHICH HE HAD NOT BEEN CHARGED WITH A CRIMINAL OFFENSE AND WHEREIN HE HAD BEEN DETAINED BY POLICE FOR A REASON OTHER THAN AN ARREST FOR A CRIMINAL OFFENSE; THE KEEPING AND DISSEMINATION OF WHICH REPORT INVADES PETITIONER'S RIGHT TO PRIVACY GUARANTEED BY THE FOURTH AMENDMENT IN VIOLATION OF THE DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT

SDCL 23-5-1 in material part provides:

> "The attorney general shall procure and file for record . . . information as may be pertinent of all persons who may hereafter be taken into custody for offenses other than those arising solely out of the violation of the fish, game, conservation, or traffic laws of this state with the exception of those persons charged with driving a motor vehicle while under the influence of alcoholic beverages, and also of all criminals wheresoever the same may be procured . . .";

from which statute Respondent City of Sioux Falls derives its police power to compile a record of criminal offenses for which Petitioner may have been arrested, charged and con-

victed. Said Respondent did not therefrom derive a police power to keep and disseminate false and defamatory contents of the noncriminal May 28, 1978 incident report (Exhibit A attached to Exhibit C in sealed envelope attached to Petitioner's Affidavit (37)) as Respondent John Roe did on October 26, 1990 to Respondents Armstrong and Hemmingsen for their television broadcasts to the public.

SDCL 23-5-10(1) provides:

> "'Confidential criminal justice information,' criminal identification information compiled pursuant to chapter 23-5, criminal intelligence information, criminal investigative information, criminal statistics information made confidential pursuant to §23-6-14, and criminal justice information otherwise made confidential by law" (emphasis added).

SDCL 1-27-1 in material part provides:

> "In every case where the keeping of a record . . . is required of an officer or a public servant under any statute of this state, such record . . . shall be kept available and open to inspection by any person during the business hours of the office or place where the same is kept."

SDCL 1-27-3 provides:

> "Section 1-27-1 shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept."

SDCL 23-5-11 provides:

"Section 1-27-1 does not apply to confidential criminal justice information."

As the aforesaid May 28, 1978 noncriminal incident report was "confidential investigative information" within the meaning and by operation of SDCL 23-5-10(1), Respondent John Doe violated SDCL 1-27-3 and 23-5-11 in reading the contents of the confidential May 28, 1978 noncriminal incident report over the telephone to Respondent Armstrong for television broadcast thereafter by Respondents Armstrong and Hemmingsen; which broadcasts by conspiratorial design of all Respondents to so defame and stigmatize Petitioner's reputation as to have immediately resulted in foreclosure of Petitioner's opportunity to be employed as a state trial court judge by way of election on November 6, 1990 by popular vote of the electorate, and has since and shall forever hereafter have foreclosed any opportunity for Petitioner to earn a living as a lawyer.

Corbitt v. Andersen, 778 F.2d 1471 (CA10 1985) holds that where the state under color

of law not only defamed psychologist but created a stigma that foreclosed his opportunity to take advantage of other employment opportunities, the psychologist made out a prima facie case that his Fourteenth Amendment liberty interest had been violated by actions of the state and was actionable through 42 U.S.C. §1983. Given the heretofore denied opportunity, Petitioner can likewise herein show that defamations of Petitioner by Respondents created such stigma that Petitioner, as a direct result thereof, thereby lost his job opportunity to be a judge and he has thereby been foreclosed from any other future job opportunities as a practicing lawyer.

Where no conviction had ensued from arrest for crime and records division of city police department was by ordinance prohibited from dissemination of foregoing arrest information as police department did in violation of said ordinance, Utz v. Cullinane, 520 F.2d 467, 480-81 (CA D.C. 1975), holds:

> ". . . Due process obligates the government to accord an individual the opportunity to disprove potentially damaging al-

> legations before it disseminates information that might be used to his detriment. The proper forum for a definitively adjudicating an individual's guilt or innocence is a trial that conforms to constitutional strictures; if the government aborts that procedure . . ., the Constitution requires that he be treated as though he engaged in no criminal activity. For the government to disseminate an arrest record pertaining to the allegedly criminal episode, when it knows that employers may infer that the individual was guilty rather than innocent of the crime, effectively permits the government to inflict punishment dispite the fact that guilt was not constitutionally established."

Given the opportunity in advance of the trial court's April 19, 1994 Summary Judgment for Respondents, Petitioner would have proved that Respondents John Doe and City of Sioux Falls intentionally disseminated false and defamatory contents and false conclusions from the noncriminal May 28, 1978 SFPD incident report to television broadcaster Respondents Armstrong and Hemmingsen to the broadcasted end of falsely imputing that Petitioner had on May 28, 1978 committed a heinous crime to aforesaid Respondents' intentional bad faith end that Petitioner not gain employment as a judge in the November 6, 1990 general elect-

ion in which Petitioner was a candidate for state circuit court judge with the consequence that Petitioner will never secure employment as a lawyer nor restore to the viable private practice of law.

Utz v. Cullinane, supra at page 482 (footnote 41), further holds that the therein aggrieved parties' rights to privacy included their rights to consent to release of arrest information should have been honored by the police department at least where no conviction of said aggrieved parties had ensued and there was no countervailing government interest adjudicated to the satisfaction of a court. In the case at bar, Petitioner was never arrested or charged, much less convicted, for a crime, and Respondents John Doe and City of Sioux Falls cannot herein present any countervailing lawful interest in their release of false and defamatory confidential information falsely imputing that Petitioner had committed a crime to Respondents Midcontinent Broadcasting, Hemmingsen and Armstrong and thereafter broadcast to the public in vio-

lation of SDCL 1-27-3 and 23-5-11.

Because false and defamatory information released by Respondent City of Sioux Falls by and through its yet to be by name identified employees, Respondents John Doe, Jane Doe and John Roe, that Petitioner had greeted parishioners in the nude at a church, been charged and arrested for a heinous felony and thereafter committed to the state mental hospital to Respondents Midcontinent Broadcasting, Hemmingsen and Armstrong for their television broadcasts so highly stigmatized Petitioner with such a badge of infamy as to destroy Petitioner's reputation for character in his community, precluded Petitioner's election opportunity from securing employment as a judge on November 8, 1990, precluded Petitioner from continuing to earn a living as a sole practitioner of law and forever foreclosed Petitioner from in the future securing employment as a lawyer by a law firm, a corporation or government, Petitioner was thereby entitled, by guarantee of the Fourteenth Amendment and controlling precedent of Wisconsin v. Con-

stantineau, 400 U.S. 433, 436-37 (1971), to due process of hearing on lawfulness of the release and broadcast of confidential information in face of and contrary to statutes (SDCL 1-27-2, 23-5-10(1) and 23-5-11) prohibiting the release of which government record to the public, and notice of hearing thereon.

4. GOVERNMENT RESPONDENTS' INTENTIONAL, ARBITRARY AND UNWARRANTED RELEASE OF CONFIDENTIAL RECORD ABOUT PETITIONER TO BROADCASTING RESPONDENTS WHERE PROHIBITED BY STATE STATUTES ENACTED TO PROTECT CITIZENS FROM PUBLICATION THEREOF INVADED PETITIONER'S RIGHT TO PRIVACY GUARANTEED BY FOURTH AMENDMENT IN VIOLATION OF EQUAL PROTECTION CLAUSE OF 14TH AMENDMENT

Petitioner's civil right of privacy herein guaranteed by the Fourth Amendment is enforceable against arbitrary invasions by Respondents through due process clause of the Fourteenth Amendment. Berger v. State of New York, 388 U.S. 41 (1967); I.N.S. v. Delgado, 466 U.S. 466 U.S. 210 (1984); State of Delaware v. Prouse, 440 U.S. 648 (1979). The principal objective of the Fourth Amendment is protection of privacy rather than property, and the essential purpose of this amendment is to shi-

eld the citizen from unwarranted intrusions into his privacy as respectively held in Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) and Jones v. U.S., 357 U.S. 493 (1958).

Absent exigent circumstance, the Fourth Amendment prohibits any intrusion on a citizen's privacy without a prior judicial determination that the proposed invasion of privacy is lawful. U.S. v. Burch, 432 F.Supp. 961 (DC Del. 1977), affirmed 577 F.2d 729. The only circumstance herein that motivated Respondents John Doe, Jane Doe, John Roe and City of Sioux Falls to so release the false and defamatory contents of the noncriminal May 28, 1978 incident report together with false and defamatory incompetent opinion that Petitioner had been arrested for and charged with a felony and false and defamatory of record government information that Petitioner had greeted parishioners in the nude at a church and was thereafter committed to the state mental hospital to Respondents Midcontinent Broadcasting, Hemmingsen and Arm-

strong for their television broadcasts to the highly stigmatic extent required to grotesquely defame and irreparably damage Petitioner's character and reputation to by any means necessary foreclose any opportunity Petitioner, but for the egregious invasion of his privacy by Respondents, may have had for employment as a state circuit court judge; hardly the "exigent" circumstance required by U.S. v. Burch, to justify, as by her admitted in her below quoted answer to Petitioner's interrogatories of record in the state action, Respondent Armstrong's, without lawful authority, directly accessing the confidential criminal investigation records computer bank of the police department of Respondent City of Sioux Falls for retrieval therefrom on her private commputer screen a false and defamatory confidential printout:

> ". . . of the May 28, 1978 incident which was shown on the screen as a statutory rape. It was from that investigation that the police case report was then found on the microfiche and read to me over the telephone by Source A"*

in violation of SDCL 1-27-3 and 23-5-11 enact-

*"Source A" is Respondent John Doe.

ed by the South Dakota legislature to protect the public at large from invasions of privacy by law enforcement agencies of South Dakota.

Petitioner's mixed 4th and 14th Amendment right not to have city law enforcement without due process release confidential investigative record to media for publication should be equal to that of person who has a federal law enforcement record, the privacy of which secures by operation of the 5 U.S.C. §522(b)(7)(C) release exemption to Freedom of Information Act and therewith creates an actionable §1983 right of privacy which should not have been denied by the lower courts just because the confidential government record at issue is compiled by a municipal police department. See FBI v. Abramson, 456 U.S. 615, 631 (1982); and Strassmann v. U.S. Dept. of Justice, 792 F.2d 1267, 1269 (CA4 1986 - journalist denied access).

Violation of the equal protection clause of the Fourteenth Amendment is actionable through 42 U.S.C. §1983. Shock v. Tester, 408 F.2d 852 (CA8 1969).

By precedent of Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (CA6 1947), the

purpose of the equal protection clause is to protect every person within state jurisdiction against intentional and arbitrary breach of right to privacy statutes (SDCL 1-27-3 and 23-5-11 by government to the selective sole detriment of Petitioner as a candidate for membership in an identifiable group (judges) from which group a yet to be identified government agent, at the behest of and in conspiracy and collusion with a commercial television news broadcaster, acts to exclude Petitioner as a member. Equal protection requires uniform treatment of persons standing in the same relation to the governmental action at issue. Reynolds v. Sims, 377 U.S. 533 (1964). The equal protection clause is applicable to discriminatory government action in administration and enforcemen t of SDCL 1-27-3 and 23-5-11 by Respondents John Doe, Jane Doe, John Roe and City of Sioux Falls; which selective violation by said governmental Respondents herein clearly demonstrates to be violative of Petitioner's right to equal protection of his right to privacy embodied in SDCL

1-27-3 and 23-5-11 and guaranteed by the Fourth Amendment. See Britton v. Rogers, 631 F.2d 572 (CA8 1980), cert. denied 451 U.S. 939.

Judge candidates not excepted as herein unlawfully the case, when a state affords one person a right by statute, it must afford all persons the same right. Sawyer v. Sigler, 320 F.Supp. 690 (DC Neb. 1970), affirmed 445 F.2d 818.

As required by Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) to be herein actionable as a violation of the equal protection clause of the Fourteenth Amendment, Respondents John Doe, Jane Doe, John Roe and City of Sioux Falls conducted their "discriminatory" course of action in selectively excluding only Petitioner from his right to protection of SDCL 1-27-3 and 23-5-11 for the sole reason and "because of" the fact that he was a lawyer candidate to be a member of a clearly identifiable group (state circuit court judges) from which the aforesaid government Respondents unlawfully acted, in conspiracy with media Respondents

Midcontinent Broadcasting, Armstrong and Hemmingsen, to adversly effect Petitioner's opportunity to be a judge and therewith exclude Petitioner as a member thereof in invasion of Petitioner's right to privacy guaranteed by the Fourth Amendment in violation of Petitioner's right to equal protection of SDCL 1-27-3 and 23-5-11 guaranteed Petitioner by the Fourteenth Amendment; and for which Petitioner has actionable §1983 claims against both the government and media Respondents herein.

5. AS GENUINE ISSUE OF FACT REMAINS TO BE HEREIN RESOLVED BY A JURY AS TO WHETHER RESPONDENTS INTENDED TO VIOLATE SDCL 1-27-3 AND 23-5-11, SUMMARY JUDGMENT WAS IMPROPERLY ENTERED BY TRIAL COURT IN ITS FAILURE TO COMPLY WITH FRCvP 56(C)

In examining a motion for summary judgment, the trial court must first determine whether any material factual issues exist which can only be resolved by a trial on the merits thereof. U.S. v. Allen, 578 F.2d 236 (CA9 1978); see also Roterman v. U.S. Steel, 472 U.S. 1139 (CA8 1973). Where trial court grants summary judgment, there must be no genuine issue of any material fact, and the moving party must

be entitled to judgment as a matter of law. Ozark Air Lines v. Air Line Pilot Ass'n, 577 F.Supp. 487 (DC Mo. 1983). As genuine issues of fact remain to be herein resolved by a jury as to whether the government Respondents, in releasing the confidential contents of the noncriminal May 28, 1978 incident report, "intended" to exclude Petitioner from being a member of identifiable group (judges) by selective non-enforcement of SDCL 1-27-3 and 23-5-11 to sole detriment of Petitioner; trial court erred in granting summary judgment for Respondents.

6. DUNKER AFFIDAVIT FRAUDULENTLY CHANGES NONCRIMINAL INCIDENT REPORT INTO ARREST FOR CRIMINAL OFFENSE IN EX POST FACTO CORROBORATION OF RESPONDENTS' BROADCAST THAT PETITIONER HAD BEEN ARRESTED AND CHARGED FOR HEINOUS FELONY AND COMMITTED TO STATE MENTAL HOSPITAL

Due to 30 page limitation for this petition, Petitioner has to rest on above argument.

7. NEWLY DISCOVERED EVIDENCE THAT RESPONDENT BREKKE RELEASED FALSE AND DEFAMATORY CONFIDENTIAL INFORMATION TO STATE COURT THAT PETITIONER HAD BEEN CHARGED AND ARRESTED FOR CRIME AND TAKEN TO STATE MENTAL HOSPITAL WORKED FRAUD ON STATE COURT AND, FOR WANT OF DISCLOSURE THEREOF HEREIN, THE LOWER COURTS HEREIN

On August 26, 1993, Respondent Brekke, without notice to Petitioner, under color of law adduced into the state court record a SFPD computer printout containing the undisputed false entry that Petitioner had on May 28, 1978 been arrested for statutory rape and another SFPD record with the undisputed false entries that Plaintiff had been "charged" with a heinous felony on May 28, 1978 and, in disposition of an unrelated misdemeanor, taken to the state mental hospital. Such falsified police records worked fraud on the state trial court to the total prejudice of Petitioner's state action, the nondisclosure of which tortious conduct by Respondent Brekke, being material facts required for Plaintiff to herein fully litigate his claims against Respondents Brekke and City of Sioux Falls, worked fraud on the lower U.S. District Court in its uninformed dismissal of Petitioner's §1983 claims herein against Respondents Brekke and City of Sioux Falls.

By precedent of Borunda v. Richmond, 885 F.2d 1384 (CA9 1988), the foregoing falsified police records transmitted by Respondents Brek-

Re and City of Sioux Falls to the state trial court and not disclosed to the U.S. District Court in advance of it April 19, 1994 Summary Judgment for Respondents are herein actionable against said Respondents by remedy of §1983 even if the undisputed falsification and dissemination of confidential records resulted from "simple negligence" of said Respondents.

CONCLUSION

As the Court of Appeals' decision that:

1. privacy of false and defamatory police record whereon no criminal charge was filed is not a fundamental right conflicts with Wisconsin v. Constantineau, Utz v. Cullinane and Borunda v. Richmond, supra, and the strongly implied holding of Paul v. Davis, 424 U.S. 693, 702, 705 (1976) that Petitioner's herein destroyed right to make a living as a result of the unlawfully published false charges that Petitioner committed a crime is creative of a fundamental right, actionable through §1983, not to be herein intruded upon by government; and

2. selective non-enforcement of privacy statutes because Petitioner was a lawyer seeking election as a judge is not violative of equal protection clause conflicts with Reynolds v. Sims and Mass. v. Feeney, supra;

Petitioner this September 5, 1995 prays that the Court grant his Petition for Writ of Certiorari.

Richard Hopewell
Petitioner pro se.
423 South Phillips Avenue
Sioux Falls, So. Dak. 57102

APPENDIXES

[APPENDIX A]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2286

Richard Hopewell, Appellant, v. William Dunker, et al. Appellees.	* * * * * * * * *	Appeal from the United States District Court for the District of South Dakota. [UNPUBLISHED]

Submitted May 23, 1995 - Filed June 5, 1995

Before WOLLMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

PER CURIAM.

Richard Hopewell appeals from the district court's grant of summary judgment to all defendants in his 42 U.S.C. § 1983 action. We affirm.

In the fall of 1990, Hopewell, an attorney, was a candidate for state court judge in Sioux Falls, South Dakota. On October 26, several weeks before election day, Jessica Armstrong and Steve Hemmingsen, television news reporters for KELOland News, owned by Midcontinent Broadcasting Corporation (the "media" defendants), aired a story about Hopewell, disclosing the details of Hopewell's arrest on May 28, 1978, on charges that were eventually dropped. Hopewell lost the election. Hopewell brought a

state court action for libel against the media defendants, which ended in a summary judgment for these defendants.

Hopewell then brought the present action, alleging that the media defendants conspired with unidentified City of Sioux Falls employees to disclose his arrest record and that the disclosure denied his equal protection. Hopewell also alleged that defendants Sioux Falls police officer William Dunker, city attorney Janet Brekke, and Midcontinent Broadcasting violated his equal protection rights by disclosing the same information in Hopewell's state libel action; and that both disclosures violated his substantive and procedural due process rights. The district court granted summary judgment, finding no constitutional right of Hopewell's implicated.

We review de novo the district court's grant of summary judgment; where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. See Crain v. Board of Police Comm'rs, 920 F.2d 1402, 1405-06 (8th Cir.1990). "Section 1983 'is

not a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" Albright v. Oliver, 114 S.Ct. 807, 811 (1994) (quoting Baker v. McCollan, 443 U.S. 137, 144, n.3 (1979)).

Hopewell's equal protection claims fail. First, he did identify a suspect classification or an infringed fundamental right. See MSM Farms, Inc. v. Spire, 927 F.2d 330, 332 (8th Cir. 1991) (where no suspect class or fundamental right involved, classification is presumed constitutional and subject to only rational basis scrutiny). Second, Hopewell does not explain how he was treated differently from others similarly situated. See Abdullah v. Gunter, 949 F.2d 1032, 1037 (8th Cir. 1991), cert. denied, 112 S.Ct. 1995 (1992) (equal protection plaintiff must show he was similarly situated to others, yet treated differently).

As to Hopewell's substantive due process claims, the disclosure of arrest records, such as those disclosed in the present case, ordinarily does not infringe upon any fundamental right to privacy. See Paul v. Davis, 424 U.S.

693, 713 (1976) (declining to establish fundamental privacy right in one's arrest records); Scheetz v. The Morning Call, Inc., 946 F.2d 202, 206 (3rd Cir. 1991). We also find no basis for Hopewell's contention that the South Dakota statutes he cites gave him a liberty interest in the confidentiality of his arrest records, entitled to procedural due process protections. See Eagley v. Rogerson, 5 F.3d 325, 328 (8th Cir. 1993).

The district court did not abuse its discretion in denying Hopewell's Federal Rule of Civil Procedure 56(f) motion for a continuance, as he did not indicate the nature of the discovery he sought or how it would help him. See Humphereys v. Roche Biomedical Lab. Inc., 990 F.2d 1078, 1081 (8th Cir. 1993); United States Through Small Business Admin. v. Light, 766 F.2d 394, 397-98 (8th Cir. 1985) (per curiam). Finally, as Hopewell failed to submit his proposed amended complaint with his motion to amend, the district court did not abuse its discretion in denying Hopewell's motion for leave to file his third amended complaint. See

Clayton v. White Hall School Dist., 778 F.2d (8th Cir. 1985).

The judgment is affirmed.

[APPENDIX B]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* * * * * * * * * * * *

RICHARD HOPEWELL, * CIV 93-4175

Plaintiff, *

vs. * ORDER OF DISMISSAL

WILLIAM DUNKER, et al.*

Defendants. *

* * * * * * * * * * * *

All pending motions came on for hearing on April 18, 1994, with the plaintiff appearing by Wendy Allison Nora, and with defendant Dunker et al. appearing by William P. Fuller and with defendant Midcontient Corp. et al. appearing by Timothy M. Gebhart, and

After arguments of counsel and upon the record,

IT IS ORDERED:

(1) That the plaintiff's Motion for Continuance of Proceedings on Motions for Summary Judgment, Doc. 34, is denied.

(2) That Dunker et al.'s Motion to Dismiss as to the City of Sioux Falls, Docs. 5, 12, 18,

and 23, will be treated as a motion for summary judgment and is granted and the plaintiff's claims against said defendants are dismissed.

(3) That Midcontinent Corp. et al's Motion to Dismiss Second Amended Complaint or Alternatively for Summary Judgment, Docs. 3, 14, 19, and 25, will be treated as a motion for summary judgment and is granted and the plaintiff's claims against said defendants are dismissed.

(4) That the Clerk of Courts shall enter judgment dismissing all of plaintiff's federal claims against all defendants with prejudice, and shall enter judgment dismissing plaintiff's pendent state claims without prejudice.

(5) That Defendants' Motion for Sanctions, Doc. 27, is denied.

Dated this 18th day of April, 1994.

BY THE COURT:

/s/ John B. Jones
Chief Judge

ATTEST: Wm F. Clayton, Clerk

By: /s/ Linda M. Ziegler
Deputy

(SEAL)

[APPENDIX C]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* * * * * * * * * * * *

RICHARD HOPEWELL, * CIV 93-4175

Plaintiff, *

vs. * ORDER

[in material part]

WILLIAM DUNKER et al., *

Defendants. *

* * * * * * * * * * * *

After examination of the record, it appears that plaintiff's Motion For Leave to File Second and Third Amended Complaints, Doc. 20, . . . should be denied as to the Third Amended Complaint because of plaintiff's failure to comply with District of South Dakota Local Rule 15.1 by failing to file a copy of the proposed amended pleadings with the motion.

. . .

Dated this 24th day of February, 1994.

BY THE COURT:

/s/ John B. Jones
Chief Judge

ATTEST: William F. Clayton, Clerk

(SEAL)

By: /s/DeAnn Martin
Deputy

[APPENDIX D]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2286SDSF

Richard Hopewell,	*	
Appellant,	*	Appeal from the ted States District
vs.	*	Court for the Dis-
William Dunker, et al.	*	trict of South Dako- ta.
Appellees.	*	[in material part]

Appellant's motion for suspension of the appeal and for remand to the trial court is denied. See Winter v. Cerro Gordo County Conservation Board, 925 F.2d 1069, 1073 (8th Cir. 1991).

. . .

August 17, 1994

Order Entered at the Direction of the Court:

/s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit